



U.S. Department of Justice

Channing D. Phillips
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*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

December 11, 2015

VIA FIRST CLASS MAIL AND EMAIL DELIVERY

Philip D. Rosenman, Esq.
HALL & ASSOCIATES
1620 I St., NW
Suite 701
Washington, DC 20006

Re: *HALL & ASSOCIATES V. U.S. ENVIRONMENTAL
PROTECTION AGENCY*, C.A. Action No. 15-2055 (KBJ)

Dear Mr. Rosenman:

As we have discussed, EPA has identified administrative errors with regard to Document 1(b), which is a draft, un-numbered document, responsive to Plaintiff's FOIA request in the above-captioned civil matter. First, the April 27, 2015 appeal determination included Document 1(b) in its list of reasonably segregable records. Although Document 1(b) was included in the draft appeal determination, a decision was made before the appeal was finalized that the draft document should be withheld in full. The appeal letter was not revised to reflect the final appeal decision, however, and as such the April 27, 2015 letter inadvertently still included a reference to Document 1(b). EPA explained in its October 29, 2015 communication that the April 27, 2015 letter included an inadvertent error.

Secondly, as I mentioned to you, after responding to you on October 29, 2015, in conjunction with preparing for its summary judgment motion, EPA discovered that the copy of Document 1(b) that was reviewed by the Office of General Counsel in the context of its April 27, 2015 appeal determination was an incomplete copy. Document 1(b) is a two-sided, five-page document, but the materials provided to the Office of General Counsel for review in the context of the administrative appeal included only three pages, not five. The provision of only three pages was a scanning error. Thus, in completing the April 27, 2015 appeal determination, the

Office of General Counsel reviewed only three of the five pages of Document 1(b), as opposed to the entire document. This scanning error resulted in an incomplete understanding of the draft document's contents. After reviewing a complete version of Document 1(b), EPA has determined that there are portions of that document that are releasable and others that must continue to be withheld under Exemption 5's deliberative process and attorney-client privileges. Attached please find a redacted version of Document 1(b).

EPA apologizes for the errors made with regard to Document 1(b). Should Plaintiff desire to have the complete version of Document 1(b) proceed to an administrative appeal review by the Office of General Counsel before Defendant files its cross motion for summary judgment and opposition to Plaintiff's filing, please let me know by December 17, 2015. You can reach me at 202-252-2526 (o) or 240-506-0502 (c).

Sincerely,

CHANNING D. PHILLIPS
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BY:



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Enclosure

SUBJECT: Applicability of *Iowa League* decision to EPA permitting determinations

TO: (b)(5) Attorney-Client, (b)(5) Deliberative Process

In *Iowa League*, the court reviewed two EPA letters and determined that the letters had promulgated two new rules regarding mixing zones and “blending.” The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if the EPA had followed APA procedures, it lacked statutory authority to promulgate the new “blending rule” concerning application of the bypass regulation in the factual circumstance described in the letters. *Iowa League v. EPA*, 711 F.3d 844 (8th Cir, 2013), rehearing denied (July 30, 2013).

The NPDES regulations require that every NPDES permit must include, either expressly or by reference, certain conditions, including a bypass condition. 40 C.F.R. § 122.41(a). With respect to bypass, the regulation provides in pertinent parts as follows:

“(m) Bypass— (1) Definitions. (i) *Bypass* means the intentional diversion of waste streams from any portion of a treatment facility

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice— (i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (1)(6) of this section (24-hour notice).

(4) Prohibition of bypass. (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.”

2. The Eighth Circuit’s decision

a. The issue before the Eighth Circuit

The court explained the issue before it as follows.

“During the spring of 2011, the Iowa League of Cities asked the EPA whether it could use ‘physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule].’” *Id.* at 859.

Here is the specific language from the September 2011 EPA letter that the court reviewed:

"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?"

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.41(m)(4). In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

(b)(5) Deliberative Process, (b)(5) Attorney-Client

"The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h)*. There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102*. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units 'do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133.' If streams move around traditional biological secondary treatment processes and through a non-biological unit that 'is itself a secondary treatment unit,' then the system would not need to meet the restrictive no-feasible-

alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged." *Id.* at 876.

c. The Eighth Circuit's decision

(b)(5) Attorney-Client, (b)(5) Deliberative Process

"The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority." *Id.* at 877-78. **(b)(5) Attorney-Client, (b)(5) Deliberative Process**

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(b)(5) Attorney-Client, (b)(5) Deliberative Process